

Criminalisation of Bribery in Palau

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**Palau National Code Annotated
Title 17**

Chapter 7, Section 701

Bribery

701. Every person who shall unlawfully and voluntarily give or receive anything of value in wrongful and corrupt payment for an official act done or not done, to be done or not to be done, shall be guilty of bribery, and upon conviction thereof shall be imprisoned for a period of not more than five years, and shall be fined three times the value of the payment received; or, if the value of the payment cannot be determined in dollars, shall be imprisoned for a period of not more than five years, and fined not more than \$1,000.00.

INTRODUCTION

The Republic of Palau (Palau) acceded to UNCAC in March 2009. It has been a member of the APG since 2002. Palau's legal system is based on common law (as understood and applied in the United States) and customary laws.¹ Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE BRIBERY OFFENCES

Palau's main bribery offence is found in Section 701, Chapter 7, of the Palau National Code Annotated (PNCA). The offence covers aspects of both active and passive bribery; however, as will be discussed in the ensuing sections of this report, the provision contains a number of features that fall short of international standards for the criminalisation of bribery.

International standards for the criminalisation of active domestic bribery cover the promise, offering and giving of a bribe to a public official. Section 701 is limited and only covers the "giving" of a bribe. A promise or offer of a bribe is not expressly covered, nor is there case law available to confirm that these modes of committing active bribery are covered in Palau. There is also no case

law to clarify whether the offence covers bribes that are made but not received, and bribes that are rejected by an official.

Passive domestic bribery should cover the acceptance or solicitation of a bribe by a public official. Section 701 covers the receiving of a bribe, but does not cover the requesting or solicitation of a bribe. Section 701 therefore falls short of international standards for passive domestic bribery.

International standards require the criminalisation of bribery through intermediaries. Accordingly, a public official who solicits or accepts a bribe from a third party intermediary, or an individual who gives a bribe to a third party to in turn give to the public official, should be covered. Section 701 does not expressly cover such forms of indirect bribery and it is unclear whether intermediaries would be covered by the wording “every person”. Section 701 also does not expressly cover third party beneficiaries of bribes.

Bribery offences generally must cover any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.² Section 701 does not specifically refer to “public officials” but covers “every person”. This term is undefined in the PNCA and it is therefore unclear whether it would broadly cover all requisite forms of public officials to meet international standards.

The Section 701 bribery offence deals with bribery in order that official acts are done or not done, or to be done or not to be done. This appears to cover an official who receives a bribe to perform or to breach his/her duty. However, it is unclear whether the term “official act” would also cover an official who uses his/her position outside his/her authorised competence (e.g. an official who uses his/her position to influence another official to provide an undue advantage to the briber). Case law is not available to clarify this point.

Section 701 refers to a bribe as “anything of value”. While the term is undefined, it appears to cover bribes of both a pecuniary and non-pecuniary nature. However, the term “value” applied renders unclear whether the definition of a bribe may be affected by its value or by its results. There is also no information on whether the definition of a bribe may also be affected by the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe or whether the briber is the best qualified bidder.

Section 701 covers bribery that is committed “unlawfully”. Regarding the mental element of the offence, Section 701 also covers bribery that is committed “voluntarily”. However, the scope of the terms “unlawfully” and “voluntarily” in relation to bribery is unclear. The PNCA does not contain some defences to bribery that are commonly found in other jurisdictions. There are no express defences of small facilitation payments, solicitation or “effective regret”.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

Foreign bribery is not expressly criminalised in Palau. While Section 701 refers to the giving or receiving of a bribe by “every person” for “an official act”, which could conceivably include official acts of foreign public officials, the offence does not expressly criminalise the bribery of officials of foreign countries or public international organisations.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Palau does not appear to impose liability against legal persons for corruption offences.³

The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.⁴ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

Palau can exercise territorial jurisdiction for acts done or omitted to be done within its territory. It is unclear whether Palau can exercise jurisdiction for acts that only partly take in Palau, or where no elements of the offence take place in its territory; for example, when a briber calls an official while in Palau to arrange a meeting, but subsequently meet and give a bribe to the official outside Palau. It is also uncertain whether Palau can exercise jurisdiction on the basis of nationality.

SANCTIONS FOR BRIBERY

The bribery offence under Section 701 of the PNCA is punishable by imprisonment for a period of not more than five years and a fine amounting to three times the value of the payment of the bribe received. If the value of the payment of the bribe cannot be determined in United States dollars, the offence is punishable for a period of not more than five years and a fine not more than USD 1 000. These sanctions are generally commensurate with international standards.

Confiscation of the bribe and the proceeds of bribery may be available in some cases. Bribery is a predicate offence to money laundering. Section 3 of the Money Laundering and Proceeds of Crime Act (MLPCA) defines a money laundering offence as including “the acquisition, possession, or control of property by any person who knows that the property constitutes the proceeds of crime”. “Proceeds of crime” is further defined as “any property or economic advantage derived from a crime”; this would include bribery. Upon a conviction for money laundering, the Supreme Court may confiscate “property forming the subject of the offence, including income and other benefits there from” (Section 33 MLPCA).⁵ This would allow confiscation of a bribe and the proceeds of bribery. It should be noted, however, that confiscation is available upon a conviction for laundering the proceeds of bribery and not bribery *per se*.

It is unclear whether administrative (disciplinary) sanctions apply for public officials who take or solicit bribes. It is also unclear whether other forms of administrative sanctions such as debarment from public procurement are available. While the Ministry of Finance has reportedly been working on developing provisions for blacklisting companies that have demonstrated dishonesty⁶, it is uncertain whether such sanctions are now available or applied in practice.

Statistics are not available on the actual sanctions (including confiscation) that have been imposed for bribery in practice.

TOOLS FOR INVESTIGATING BRIBERY

The Bureau of Public Safety, Division of Criminal Investigations (BPS, DCI) is responsible for investigating criminal cases, including bribery.⁷ General search and seizure provisions are provided under Title 18 (Criminal Procedure) of the PNCA. These provisions are available for investigating bribery offences. Sections 303 to 305 set out the procedure for obtaining search and seizure warrants. Such warrants are issued on the basis of a sworn affidavit of probable cause filed with the Supreme Court. Property for which a search warrant may be issued includes *inter alia* property which is prohibited by law; property necessary to be produced as evidence, and; property designed or intended to be used or which has been used to commit a criminal offence (Section 304, Title 18, PNCA). The term “property” is defined as including documents, books, papers and any other tangible objects (Section 304(b)). This would allow police to seize (physical) records held by financial and other institutions for evidentiary purposes.⁸

The BPS, DCI, through the Office of the Attorney General (OAG), can also compel the production of banking records. While not expressly listed in PNCA, these records would include transaction records, account files, business correspondence and other records.⁹

Other investigative tools are available for money laundering offences, and can be used to investigate laundering the proceeds of bribery. The MLPCA allows the Financial Intelligence Unit (FIU) or the OAG to monitor bank accounts; access computer systems, networks and servers; place under surveillance or tap telephone lines, fax machines, or electronic transmission or communication facilities; electronically record acts and behaviour or conversations, and; inspect communications of notarial and private deeds or of bank, financial, and commercial records (Section 24). These tools are only available when evidence exists constituting probable cause that the targets are suspected of participating in money laundering offences. If not, the FIU or the OAG will need a warrant issued by the Supreme Court.¹⁰ Section 26 of the MLPCA (Disallowance of Bank Secrecy) states that banking or professional secrecy laws may not be invoked as grounds for refusal to provide information.¹¹ It is unclear whether investigators may also have access to tax records and whether any secrecy laws may apply. However, these investigative tools under the MLPCA are only available for investigating money laundering and not bribery *per se*.

Other special investigative techniques also appear to be available in the context of money laundering offences. Section 25 of the MLPCA provides for “undercover operations and controlled delivery”. It is unclear whether other

practices, such as plea negotiations, the use of co-operative informants or witnesses, and immunity from prosecution for persons who co-operate in corruption investigations and prosecutions, are available or used in practice.

International assistance is available for investigating bribery. Section 1311 (Title 18) of the PNCA¹² states that Palau may seek mutual legal assistance in any investigation or proceeding in relation to a serious offence. A “serious offence” is defined as an offence against “any law of the Republic which is a criminal offence punishable by imprisonment for more than one year” (Section 1302(p)). Bribery, under Section 701 of the PNCA, is punishable by a maximum of five years’ imprisonment and thus falls within this threshold.

ENFORCEMENT OF BRIBERY OFFENCES

The BPS, DCI is responsible for investigating criminal cases, including bribery,¹³ while the Attorney General has conduct of bribery prosecutions.

Statistics on the number of investigations, prosecutions and convictions of bribery are not available. The Bureau of Public Safety does not keep statistics on investigations and seizures to any of the predicate offences for money laundering, including bribery.¹⁴

RECOMMENDATIONS FOR A WAY FORWARD

Palau has already made some significant efforts in criminalising bribery offences. To further enhance compatibility with international standards, Palau could consider the following.

Elements of the Active and Passive Domestic Bribery Offences

Section 701 of the PNCA covers certain aspects of both active and passive domestic bribery. However, to improve its bribery offence, Palau could consider addressing the following areas:

- (a) Express language covering additional modes of committing bribery, such as the promise and offer of a bribe; the request or solicitation of a bribe; third party beneficiaries, and; bribery through the use of intermediaries;
- (b) Incomplete offences, such as when a bribe is offered to but not received by an official, or when an official rejects a bribe;

- (c) Express language covering all requisite forms of public officials, including persons holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid, and; any person performing a public function, including for a public agency or public enterprise, or provides a public service;
- (d) Bribery in order that an official uses his/her position outside his/her authorised competence;
- (e) Express language covering the definition a bribe (“anything of value”), which is not affected by its value or results, the perceptions of local customs, the tolerance by local authorities, the alleged necessity of the bribe or whether the briber is the best qualified bidder.

Bribery of Foreign Public Officials

To bring its criminal bribery offences into line with international standards, Palau should expressly criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Palau does not impose liability against legal persons for corruption offences. Should Palau consider establishing a system imposing liability against legal persons for bribery, it may wish to take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects a wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when persons with the highest level of managerial authority (i) offer, promise or give a bribe to an official; (ii) direct or authorise a lower level person to offer, promise or give a bribe to an official; or (iii) fail to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Jurisdiction for Prosecuting Bribery

To ensure its overall jurisdictional basis for prosecuting bribery is sufficiently broad, Palau could address the follow matters:

- (a) Providing territorial jurisdiction to prosecute acts of bribery that partly take place in Palau, and in cases where no elements of the offence take place in its territory, e.g. when a briber calls an official while in Palau to arrange a meeting, but subsequently meet and give a bribe to the official outside Palau;
- (b) Exercise jurisdiction on the basis of nationality;
- (c) Providing nationality jurisdiction to prosecute legal persons for bribery.

Sanctions for Bribery

The bribery offence Section 701 of the PNCA is punishable by a maximum of 5 years' imprisonment and a fine amounting to three times the value of the bribe; if the latter cannot be determined, the offence is punishable for by a maximum of 5 years' imprisonment and a fine of not more than USD 1 000. The maximum term for imprisonment is in line with international standards. To ensure sanctions for bribery are effective, proportionate and dissuasive, Palau could address the following issues:

- (a) The sufficiency of the maximum fine for bribery;
- (b) The availability and/or application of administrative (disciplinary) sanctions, such as debarment from public procurement.

Tools for Investigating Bribery

Palau has a good range of investigative tools at its disposal under Title 18 of the PNCA and under the MLPCA. Palau could improve its ability to investigate bribery cases by addressing the following issues:

- (a) Make available the same special investigative tools found under the MLPCA for the investigation of bribery offences;
- (b) The availability, and formalising in writing practices (if they exist), such as plea negotiations with a defendant, and reliance on co-operative informants and witnesses;

- (c) Granting immunity from prosecution persons who co-operate in corruption investigations and prosecutions.

Enforcement

Statistics are an essential tool for evaluating whether a scheme of criminalising bribery is effective. Palau could therefore consider maintaining full and current statistics on investigations, prosecutions, convictions of bribery. It could also maintain statistics on the number and nature of sanctions imposed in bribery cases, including confiscation.

RELEVANT LAWS AND DOCUMENTATION

Laws were provided directly by the Republic of Palau.

IMF/APG (2009), Mutual Evaluation Report: Palau: www.apgml.org/documents/docs/17/Palau%202008.pdf

NOTES

- ¹ See: Asian Development Bank (2007), *Palau: Policies for Sustainable Growth, Chapter V: Issues Relating to Palau's Legal System and Property Rights*, Asian Development Bank, July 2007, available at: www.adb.org/Documents/Reports/PSA/PAL/default.asp
- ² See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ³ See: ADB/OECD (2007), *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, 2007, p. 238, available at: www.oecd.org/dataoecd/28/47/37900503.pdf
- ⁴ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ⁵ The IMF has concluded that this provision allows confiscation of the proceeds and instruments of crime. See: IMF (2009), *Palau: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism*, International Monetary Fund, Washington DC, January 2009.
- ⁶ See: Transparency International (2004), *National Integrity Systems: Transparency International Country Study Report: Republic of Palau*,

Transparency International, 2004, at p. 36, available at:
[www.transparency.org](http://www.transparency.org/content/download/1698/8541/file/palau.pdf)

⁷ IMF (2009), *Palau: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism*, International Monetary Fund, Washington DC, January 2009, at p. 57.

⁸ *Ibid.*, p. 59.

⁹ *Ibid.*, p. 59.

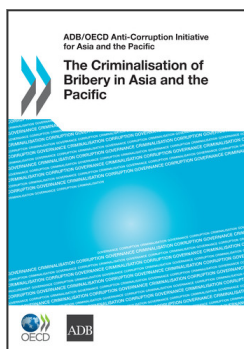
¹⁰ *Ibid.*, p. 58.

¹¹ *Ibid.*, p. 83.

¹² Also titled: Mutual Legal Assistance in Criminal Matters Act (2001).

¹³ IMF (2009), *Palau: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism*, International Monetary Fund, Washington DC, January 2009, at p. 57.

¹⁴ *Ibid.*, p. 61.



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